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# R. v. Mukasa; R. v. Spinosa; R. v. O'Brien

Between
Her Majesty the Queen, and
Kayemba Mukasa, Maximillian Spinosa and Martin O'Brien

[2001] O.J. No. 262

**Ontario Court of Justice**
**London, Ontario**
**Pockele J.**

Oral judgment: November 16, 2000.
(38 paras.)

**Counsel:**

J. Spangenberg, for the Crown.
B. Cashmore, for the defendants, Mukasa and O'Brien.

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¶ 1 **POCKELE J.** (orally):— There are three appeals before the Court: R. v. Kayemba Mukasa, R. v. Maximillian Spinosa and R. v. Martin O'Brien. Mukasa and O'Brien are represented by Mr. Cashmore. All appeals were heard on October 26, 2000, and decision is delivered today.

¶ 2 All three matters are appeals of trial decisions made by justices of the peace relating to charges under Section 128 of the Highway Traffic Act, speeding charges. All three decisions were dependant upon rulings made regarding the admissibility of evidence of rate of speed obtained by laser speed detection devices, which I will refer to as LSDD hence forward. Mukasa and Spinosa are Crown appeals of acquittals, O'Brien is a defence appeal of a conviction.

¶ 3 Again, the common issue in all three appeals was the admissibility of LSDD readings as evidence of a motor vehicle's rate of speed. Several sub-issues flow from common issue and these are raised in the appeals. These sub-issues are defined as follows: number one, is LSDD evidence new or novel technology? Number two, if LSDD is new or novel technology, must it be tested by reference to established and Court accepted technology, such as radar detection devices, in order to determine whether it can accurately measure the speed of a moving vehicle? Number three, if there is to be such comparative testing, how frequently must such testing occur? And number four, is there any valid reason for imposing a regime of comparative testing every 30 days?

¶ 4 The most recent pronouncement on this issue is the Ontario Court of Appeal decision in R. v. Vancrey, [2000] O.J. No. 3033, for the benefit of the reporter I will hand down my type written notes in this matter and she can obtain the spelling from that. That was delivered on August 18, 2000. I have also been

referred to the decision of R. v. Wong, [2000] O.J. No. 1442, a decision of the Ontario Court of Justice, now Superior Court, sitting as an appeal court from a trial decision of the Provincial Offences Court, the case of R. v. McInerney, a decision of the Ontario Court of Justice, formerly a Provincial Court sitting as an POA appeal court. These decisions outline the approaches that Ontario Courts have taken in dealing with issues of admitting LSDD evidence in trial proceedings. And, as decisions of the Ontario Courts, they are of highly persuasive value.

¶ 5 I have also reviewed relevant decisions from the trial and appellate courts from the provinces of British Columbia, Alberta and Manitoba. These cases establish the history of LSDDs. Police have been using LSDDs in this province since 1993. This was new technology, the older established technology being radar detection devices. Courts in Alberta, Manitoba, Ontario, British Columbia, all have expressed concerns that LSDDs being new technology not specifically authorized by statute as an evidence gathering device, as is done in the Criminal Code with respect to such devices as breath-alcohol measuring devices, require some evidence of accuracy and reliability. And that can be provided by comparative testing against radar detection devices.

¶ 6 It is interesting that in 1995 the province of Manitoba designated one particular make and model of an LSDD as an approved speed timing device, pursuant to the regulatory scheme under their particular Highway Traffic Act, rendering this issue moot in that province for that device. Ontario has not done so.

¶ 7 Different courts, at trial and appellate level, have given directions concerning the need for comparative testing procedures that would satisfy the concerns that LSDDs were accurate and reliable.

¶ 8 I deal now with the four sub-issues which feed into the primary issue. The first and foremost issue is this: Is LSDD evidence new or novel technology? The answer to this question forms the lynchpin of all of these three appeals. Once technology has become proven and established, the concern about comparative testing becomes irrelevant, the concern about the schedule of testing becomes irrelevant, and the 30 day rule becomes irrelevant. In this appeal I rephrase the question, "Is LSDD evidence new or novel technology," to a different rhetorical question, "When does that which is new become old?" I find as fact that Laser Speed Detection Devices, while once a new and novel technology, is no longer so on today's date. Certainly, this could not have been said when the POA appeal court heard R. v. Taman, a decision registered by Justice Bogusky, in the Ontario Provincial Court, March 12, 1998, or on the offence date in Vancrey, which was in February of 1998, or when this issue was dealt with in other provinces in the first half of the last decade. I am mindful that this decision is being released on the eve of the year 2001. Vancrey confirmed that LSDD technology began to be used in Canada in 1993 and had been used in the United States before then. We are dealing with Laser Speed Device Technology that has had eight years of history in this country. The principals of laser technology were developed after World War II and are based upon the immutable laws of physics relating to light energy. Lasers now have daily applications in virtually every home, industry and office. People use CD players, laser surgery, automobile assembly devices, and even the space shuttle can be docked using laser technology. One must be mindful, as we approach the year 2001, that in today's world, a child's video game has more computing power than the craft used in the Apollo moon missions and computers become obsolete every 24 months. I am concerned that a finding, or continuing to find, that LSDD technology is new or novel represents a mind set that is simply not representative of current scientific and technological thought and cannot be supported by the scientific and technical evidence tendered to the courts in all of the previous cases. In Vancrey, a decision of the Ontario Court of Appeal, in paragraph 20, Mr. Justice Feldman spoke to this very issue when he commented that this point, whether LSDD technology is new or novel, had not been argued and therefore the OCA was -- the Ontario Court of Appeal, was not deciding whether the courts could take judicial notice of the reliability of LSDDs. And I quote,

"... at this point in the history of the use of a laser device".

Clearly, the Ontario Court of Appeal has left this question open to be decided in other courts. In matters such as this, where concepts of technology and science are in issue, the courts should defer to experts in those fields. Rather than applying rules that provide comfort levels drawn from education and experiences in non-related fields. It is not for the Court to take upon itself to demand,

"... independent guarantees of trustworthiness ..."

as expressed in Wong, where there is no technical or scientific evidence which outlines a need for a guarantee of trustworthiness. The decisions in Wong and Vancrey are replete with references to uncontradicted scientific evidence which confirms the accuracy and reliability of LSDDs at this time in the history of such devices. In every case extract provided to me, each trial court and appeal court has commented that no evidence was presented to contradict the accuracy of the LSDD. If no such evidence has come before the Court in the last eight years, it is time to accept that LSDD technology is so well established that there is no evidence to the contrary. On this issue, the courts need not assume the function as gatekeeper, protecting the citizenry from new, novel and unproven technology as evidence. LSDD technology is no longer new and novel, and it is proven.

¶ 9 I now turn to the second question: Must LSDD technology be tested against older and proven technology? Having ruled that LSDD technology is no longer new or novel technology, the answer to this question becomes moot. However, where comparative testing was deemed necessary, then what logical reasons are there for such testing, the requirement for such testing? Certainly, there must be some scientific or technical reason for imposing a comparative testing regime. In the case of R. v. Wong, an appeal decision to a Justice of the Superior Court, Justice O'Hara begins his analysis by indicating that evidence of the adequacy of LSDDs comes before the court on a trial and error basis. Yet, at nowhere in the evidence was any evidence submitted relating to any errors. Justice O'Hara continued and reviewed several manuals related to the operation and testing of the particular LSDD devices before him. Justice O'Hara stated that,

"... without reservation ..."

and I quote, he found that the LSDD, and again I quote,

"... was adequate generally for the purpose of detecting the speed of moving motor vehicles in a law enforcement setting."

Justice O'Hara went on to adopt the testing and results in a New Jersey court decision on the same point. And he ultimately concluded that the LSDD in that case, and I quote,

"... is adequate and accurate enough to be relied upon the Courts for this purpose."

Yet, he went on to state of his own initiative,

"I cannot accept that additional verification to standard set up and tests is not required."

He related this element of his reasons to an excerpt in the manual which described an extra testing procedure, and I quote,

"If additional verification is desired ..."

Nowhere in the evidence was it indicated that such additional verification was suggested, necessary, or even prudent. And in fact, the whole of the uncontradicted technical evidence was that such testing was in fact unnecessary. The imposition of a comparative testing regime in Wong imposes a technical check, a judicially imposed technical check, that flies in the face of any scientific or technical evidence before the Court. In the Ontario Court of Appeal decision in Vancrey, the Court broadly reviewed decisions from across Canada, extending back to 1991, regarding the acceptance of LSDD technology in courts. Paragraph 22 of that decision the Court of Appeal accepted the Crown position that a trained and experienced officer, having testing the device before and after its use in accordance with manufacturers instructions together with some earlier verification of its ability to measure velocity, inferentially here a comparative radar test, provides prima facie evidence of accuracy and reliability. But again, the Ontario Court of Appeal left it open in that decision for some other court to consider whether comparative testing is still necessary if LSDD technology is not new or novel. In any event, the requirement for comparative testing imposed by courts such as Wong, is made in the absence of any scientific or technical evidence that cannot be supported on the facts.

¶ 10 Questions three and four involve how frequently should the comparative testing be done, and whether a 30 day schedule should be imposed. The Ontario Court of Appeal in Vancrey clearly offered no opinion as to the frequency of comparative testing. Clearly they did not do so because there was no scientific or technical evidence indicating when and if it should be done. In Wong, Justice O'Hara expressed that the issue of testing on a schedule presented him with and I quote, "difficulty," stating, and again I quote,

> "It is almost an impossible proposition. I cannot see the necessity of having a before and after test for each machine for each case."

I end the quote. But then at the end of his decision he went on to suggest that the 30 day comparative schedule should be imposed in order to always provide a before and after test. This decision again was made in the face of uncontradicted expert evidence from Professor Killgallin, who stated that additional testing added nothing to the reliability of the instrument. The same expert witness was questioned by a judge concerning error trapping methods inherent in the machine and the expert testified these were addressed in the static test therefore no other test was necessary. In the absence of any contradictory evidence, Justice O'Hara rejected the single aspect of the qualified expert's testimony, and imposed a condition because, in the words of Justice O'Hara,

> "I was not satisfied with his explanation."

Respectfully, in the absence of contrary evidence, in the absence of any scientific evidence, the Court simply cannot ignore the cogent scientific technical evidence. The 30 day testing schedule is a time period without any scientific or technical validity.

¶ 11 I conclude by stating that having ruled that LSDD technology is no longer new and novel, my decision on the sub-issue is moot. However, the fact is in Vancrey the issue was raised regarding the frequency of comparative testing. In the absence of any technical scientific evidence that comparative testing is necessary or recommended, then only one comparative test should be performed. And again, this is obiter because I have decided this is not new or novel technology. And if only one comparative test should be performed, that test should be performed prior to the inaugural use of the LSDD in the operational field. Accordingly, applying this reason to Mukasa and Spinosa, the appeals will be allowed.

¶ 12 I will seek direction from the Crown as to the disposition in O'Brien. The appeal will be dismissed and the sentence confirmed. What does the Crown want in Mukasa and Spinosa? New trials?

¶ 13 MR. SPANGENBERG: Well in Mukasa the only issue, Your Honour, was there would have been a conviction had it not been for the uncertainty of the testing of -- the comparison testing between laser and radar. And I'd ask, Your Honour, to allow the appeal to enter a conviction.

¶ 14 **THE COURT**: What does Mr. Cashmore say?

¶ 15 MR. CASHMORE: I have no remarks.

¶ 16 **THE COURT**: Can I have the endorsement in ....

¶ 17 MR. SPANGENBERG: And, Your Honour, in Spinosa --

¶ 18 **THE COURT**: Just let me catch up on this matter here.

¶ 19 MR. SPANGENBERG: Oh, I'm sorry.

¶ 20 **THE COURT**: Mr. Cashmore, you now had to come down here twice to argue this novel issue?

¶ 21 MR. CASHMORE: Pardon me, Your Honour?

¶ 22 **THE COURT**: Did you have to come down here twice on Mukasa now?

¶ 23 MR. CASHMORE: Yes.

¶ 24 **THE COURT**: On my motion, I will bury this sentence to $100 to reflect the cost of having counsel attend and argue the novel issue. I think he paid the fine, did he not?

¶ 25 MR. SPANGENBERG: I believe he did.

¶ 26 **THE COURT**: I am also aware you travelled from Toronto on that matter. Okay, what is happening in Spinosa?

¶ 27 MR. SPANGENBERG: Your Honour, my review of Spinosa is that it is not as cut and dry as Mukasa, but it all seems to me that the only issue there that seems to trouble the justice of the peace was the comparative testing.

¶ 28 **THE COURT**: Mr. Cashmore, you want a new trial on that one?

¶ 29 MR. CASHMORE: Again, Your Honour, I'm not appearing on the Spinosa --

¶ 30 **THE COURT**: You are not on Spinosa?

¶ 31 MR. CASHMORE: No. I was actually going to ask if I could be excused.

¶ 32 **THE COURT**: You may.

¶ 33 MR. CASHMORE: Thank you.

¶ 34 **THE COURT**: Mr. Spinosa not arrived yet?

¶ 35 MR. SPANGENBERG: I think Mr. Spinosa on the last day just -- he didn't come back in the afternoon even though I told him that the matter was going to go over to the afternoon.

¶ 36 **THE COURT**: Appeal granted, conviction entered. The fine will be per set fine, $215. $215. Surcharge of $40, six months to pay. O'Brien? That has got to be a re-trial. I did not bring the transcripts with me. I just have my notes on what we are actually doing.

¶ 37 MR. SPANGENBERG: Actually O'Brien is the defence appeal on the conviction.

¶ 38 **THE COURT**: And he has got a fine of $122.50. Just put down dismissed. Conviction affirmed, fine confirmed.

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